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CONVERSIONS OF CUSTOMARY LANDS TO LEASEHOLD TITLES

Zambia



The amount of land held by customary communities in Zambia is diminishing, in part as a result of the 1995 Land Act, which makes it easier for investors to acquire leaseholds over customary land. *Photo: ©WorldFish*

By Nick Tagliarino

INTRODUCTION

Zambia recognizes two types of land tenure: customary and leasehold tenure. While historically the majority of land in Zambia has been held under customary tenure, leases (also called leasehold titles) are the only legal means of holding land rights. In 1995, a new Land Act was passed, which makes it easier for investors to acquire leasehold titles to customary land. When an investor obtains a leasehold title to customary land, the customary land reverts to the state once the lease expires and is thereafter governed by statute. The erosion of customary rights that results from conversion is particularly burdensome on rural communities that depend on customary lands for drinking water, firewood, livestock, and other resources (Brown 2005). This brief analyzes the conversion process and its impact on rural communities, and discusses proposed solutions for securing customary land rights in Zambia.

MAP



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Many customary communities organize their members into a social hierarchy with the Chief at the highest position.



The Chief has the power to grant occupancy rights to customary land, oversee land transactions between community members, regulate the use of common resources, and resolve land-related disputes. *Photo: ©Oxfam*

CUSTOMARY LAND IN ZAMBIA

Customary land is crucial to the survival and well-being of rural communities in Zambia. Land is a source of food, shelter, social status and power (Mudenda 2006). Customary lands provide communities with a commonly shared pool of natural resources. From the pool, villagers acquire drinking water from rivers and village wells, graze livestock on pastures, cut firewood and building materials from forests, and catch fish in lakes and rivers (Brown). Customary lands also function as a safety net in times of uncertainty. For instance, in southern Zambia, when rainfall is inadequate during dry seasons, communal access to the Zambezi River and its banks allow for villages to obtain water for grazing livestock (Brown 2005).

Under customary tenure arrangements, rural villagers are given rights to customary lands based on their membership within a community. Each community is unique, but, in many communities, membership can be granted or denied by the Village Headman (Loenen 1999). Many communities organize their members into a social hierarchy at the household, village, clan, and chiefdom levels. The Chief is often the highest position on

the hierarchy. The Chief has power to grant occupancy and use rights, oversee land transactions between community members, regulate common pools of resources, and adjudicate land disputes (Brown 2005).

THE BASIS OF TENURE INSECURITY: HISTORY OF LAND TENURE IN ZAMBIA

Throughout history, Zambia has followed a dual system of land tenure. In 1924, the British Colonial Authority divided land into two categories: Crown Land and Native Reserves (Loenen 1999). Native Reserves were designated for the exclusive use of Africans. Land rights on Reserves were granted based on customary law. Chiefs controlled the use and allocation of Reserve land. Upon approval by the Chief and central government, non-natives were permitted to hold land in Reserves, but not for more than five years. In 1947, the British Government carved out portions of utilized Crown Land to establish Native Trusts. On Native Trusts, the Governor, who was designated the leader of Zambia under British rule, could grant rights of occupancy for a 99-year period to non-indigenous people. Despite such

grants, Native Trusts remained under customary tenure and could not be converted to Crown Land (Brown 2005).

Following Zambia's independence in 1964, Crown Land was converted to state land and thereafter administered by the Ministry of Lands. All state land was vested in the President, and any land transaction involving state land required the President's approval. Freehold tenure rights to state land were abolished and converted to statutory leaseholds. Meanwhile, on Native Reserves and Trusts, indigenous populations continued to follow the tenure system which existed under British rule. The Zambian government continued to recognize the Chief's right to regulate the use and allocation of trust and reserve land (Hansungule 2001).

THE 1995 LAND ACT

Following its election to government in 1991, the Movement for Multiparty Democracy (MMD) proposed a wave of new land reforms intended to establish a more efficient system of tenure conversion in Zambia (MMD 1991). The MMD sought to institute a system which would attach economic value to undeveloped land and reward the



New land reforms followed the 1991 election of the Movement for Multiparty Democracy into government.



The Movement for Multiparty Democracy (MMD) wanted to establish a more efficient tenure system that would reward the productive use of land; they did this by making it easier for investors to gain private title to customary land. *Photo: ©WorldFish*

productive use of property by making private titles to customary lands easily accessible for investors (MMD 1991). The Zambian Government justified such reforms by stating that customary land tenure is “insecure” and subject to “severe limitations” (GRZ 2000). Not only would a more secure tenure system benefit investors, but, by leasing land rights to investors, villagers would be able to use their land as collateral to secure credit to invest in farms and businesses (Brown 2005). To address these concerns, the 1995 Land Act was passed, which codified a procedure for investors to acquire leasehold titles to customary land, and thereby obtain statutorily recognized land rights.

THE CONVERSION PROCESS: HOW LEASEHOLD TITLES TO CUSTOMARY LANDS ARE ACQUIRED

The 1995 Land Act states that all land in Zambia shall vest absolutely in the President (sec.3(1), Land Act, 1995). By law, all land transactions require the President’s consent except for grants of use and occupancy rights based on custom (sec. 8(3), Land Act, 1995). The President may convert customary tenure into leasehold title under a wide

range of circumstances as long as he takes into consideration local customary laws on land tenure and consults with Chiefs, District Councils, and any person whose interests might be affected by the conversion. (sec. 3(3)-(4) Land Act, 1995; sec. 4(D)(ii) Admin. Cir.). By law, the President delegates the day-to-day administration of land matters to the Commissioner of Lands (sec. 2, Admin. Cir., 1985). The Commissioner of Lands is empowered by the President to “make grants or dispositions to any person subject to regulations enacted by the Minister of Lands” (sec. 2, Admin. Cir., 1985).

The conversion of customary land to leasehold title requires approval from three authorities: the Chief, the District Council, and the Commissioner of Lands. First, the written consent of the Chief must be obtained by the District Council (sec. 4(D)(ii)(a), Admin. Cir., 1985). Next, the District Council must submit to the Commissioner of Lands a resolution recommending whether or not to convert the customary tenure into leasehold title. The resolution must include minutes from the Council’s committee meeting at which the decision was reached and an approved layout plan for the tract of land endorsed by the Chief, the Chairman of the Council,

and the District Executive Secretary (sec. 4(D)(ii)(a), Admin. Cir., 1985). District Councils are “advised” not to recommend the alienation of land areas that exceed 250 hectares (sec. 4(D)(v), Admin. Cir., 1985). Once the resolution is submitted to the Commissioner of Lands, the Commissioner of Lands then makes a decision on whether or not the land should be converted. The Commissioner of Land must invariably accept the District Council’s recommendation unless doing so “would cause injustice to others or if [the District Council’s recommendation] is contrary to national interest or public policy” (sec. 3, (Admin. Cir., 1985)).

Along with granting powers to the President to convert customary land, the 1995 Land Act also allows “any person” who holds land under customary tenure to apply to convert it to a leasehold title (sec. 891, Land Act, 1995). The lease cannot exceed 99 years (sec. 8(1), Land Act, 1995). Their application must be approved by the Chief and District Councils (sec. (8)(2), Land Act, 1995). Land may thereafter be converted into leasehold tenure “by way of a grant of leasehold by the President [or] any other title that the President may grant” (sec. 8(1)(a), Land Act, 1995). The President may extend the lease agreement to a

term exceeding 99 years if he or she “considers it necessary in the national interest” (sec. 3(6)(a), Land Act, 1995).

THE IMPACT OF LAND CONVERSIONS ON CUSTOMARY RIGHTS HOLDERS

The 1995 Land Act is silent on whether converted land remains customary land under the authority of traditional leaders. In practice, however, converted land is treated as state land governed by the Land Commissioner. It is also unclear whether the grant of a leasehold title to converted land necessarily extinguishes all customary rights previously attached to the land. Although the Act prohibits the unlawful occupancy of land that is converted to leasehold title, which means that holders of customary occupancy rights must vacate converted land, (sec. 9, Land Act, 1995), it neither states what effect a land conversion has on customary use rights nor whether converted land remains subject to customary law. Furthermore, the Land Act does not stipulate what becomes of converted land once leases expire. In practice, customary rights attached to converted land are extinguished once leases are granted.

The conversion process does diminish the Chiefs’ authority. Only the Commissioner of Lands is considered the statutory landlord when lease agreements are made with investors. By law, Chiefs are not given any bargaining or oversight power to ensure the terms of the lease are adhered to and the land is managed effectively (Metcalf 2006). Land leases are only subject to statute and regulations passed by the Ministry of Lands. (sec. 7, Admin. Circ., 1985).

Due to the high costs associated with obtaining leasehold titles, the conversion process puts impoverished villagers at a disadvantage (Brown). Although the Land Act provides villagers with an opportunity to use their land as collateral to secure credit, the cost of doing so is prohibitively expensive for many villagers. Villagers must hire a surveyor to map their tract of land and pay a lease charge, a cost which amounts to at least 500,000 kwacha

(about \$100) (Brown). For 99-year leases, boundary surveys can sometimes amount to millions of kwacha (hundreds of dollars) in fees (Brown). Villagers must also bear transportation costs if the surveying team has to travel from Lusaka. Furthermore, securing a lease entails incurring the cost of traveling to the Ministry of Land offices in Lusaka and Ndola. The Ministry of Lands also imposes an annual ground rent charge for leasehold title holders (sec. 6(2), Land Act, 1995). The rent charge is currently set by statutory instrument no. 44 of 2006, which, when it was passed, increased the ground rent by between 500-600 percent for all agricultural lands (Statutory Instrument No. 28 of 2010; ZNFU, 2010).

The Act’s vague wording also puts customary rights holders at a disadvantage. When deciding whether to convert customary land, the President is required to “take into consideration” local customary law and consult with any person or body whose interest might be affected by a land conversion (sec. 3(4), Land Act, 1995). However, the Act provides no guidance on what is meant by the phrase “take into consideration,” and only requires the President to

consider customary laws which are not in conflict with the Act (sec. 3(4)(a), Land Act, 1995). With respect to the provision requiring the President to consult with aggrieved persons, the Act neither establishes how such a consultation should take place nor what remedies an aggrieved person should be afforded in the event of a conversion. Since any person who continues to occupy the converted tract of land is liable to be evicted (sec. 9(2), Land Act, 1995) and the Act does not require the President to grant compensation for converted land, the conversion process may have devastating consequences for customary rights holders.

The only recourse for individuals who are aggrieved by land conversions is to file a claim with the Lands Tribunal (sec. 15, Land Act, 1995). While the Tribunal was intended to provide poor, non-titled individuals with a grievance mechanism by which they could protect their customary land rights, the Tribunal has proven to be ineffective, inaccessible, and costly (Brown). Aside from the lack of awareness among villagers of the Tribunal’s existence, the Tribunal rarely travels beyond Lusaka and thus claimants must incur traveling costs



The high cost of obtaining titles means impoverished villagers can rarely take advantage of the conversion process, and those who are displaced by conversions do not receive compensation. The Land Tribunal, intended to help protect customary rights, has been proven ineffective, inaccessible, and costly. Photo: ©World Bank



to pursue their claims. In practice, claimants are also required to incur the cost of acquiring legal representation to draft affidavits and forms even though the Land Act states that “the Tribunal shall not be bound by the rules of evidence applied in civil matters” (sec. 23(5), Land Act, 1995; Brown). Lastly, aggrieved parties are likely to experience excessive delays due to the current backlog of cases waiting to be heard by the Tribunal (Brown 2005).

CASE STUDY: COMMUNITY DEVELOPMENT TRUST (CDTs) IN THE SEKUTE CHIEFDOM

To address some of these issues, the African Wildlife Foundation (AWF), an international conservation NGO, has facilitated the establishment of Community Development Trusts (CDTs) in Zambia. CDTs are designed to secure customary land rights by mobilizing rural communities to acquire private leasehold titles to customary land. Once customary land is converted into a leasehold title held in the form of CDT, the land continues to be administered following customary laws and practices. Under a CDT structure, the trust proposes land sites to be converted for the traditional ruler’s consideration (Metcalf 2006). This way, traditional leaders can continue to regulate the allocation of customary land; however, under a CDT, the traditional leader’s authority is statutorily recognized. Traditional leaders are also responsible for mobilizing community members, overseeing and regulating Board of Trustees elections, ensuring the CDT by-laws and constitutions are upheld, and resolving land disputes (Metcalf 2006).

Zambia’s wildlife abundance makes it an appealing tourist destination; however, when tourism investors obtain leasehold titles to customary lands, their revenues are not always shared with the local communities (Metcalf 2006). Tourism investment has not led to improved health, education and infrastructure (Metcalf 2008; Munodawafa 2005). By providing an outlet through which rural communities can directly manage private sector leases, CDTs can help

+ FACT

Under the 1995 Land Act, almost all land transactions require the consent of the President of Zambia. The only exceptions are customary use and occupancy rights.

rural communities generate revenue from the tourism industry. CDTs also appeal to private investors who seek a stable and effective business relationship with local communities.

All community members are entitled to CDT membership. To effectively manage communal lands, members of CDTs are organized into committees at the village, area, and chiefdom levels. The CDT works in a participatory manner to seek investor lessees and regulate communal land as both a statutory and customary landlord. AWF has helped develop action plans that identify and prioritize key land and natural resource areas that should be managed by CDTs.

In 2000, AWF began developing a CDT in the Sekute Chiefdom, an area of 250,000 hectares on which 17,500 people reside (Metcalf 2006). According to AWF, the Sekute Chiefdom was worth protecting because of its significant wildlife potential, good tourism sites, and 60 kilometres of Zambezi River frontage (Metcalf 2006). After meeting with AWF, the Chiefs and traditional leaders agreed to develop a CDT to manage land leases to private investors. The Sekute CDT drafted a constitution which organized the Chiefdom’s 289 villages into fifteen trust areas based on customary headmanship. Each area had its own trust committee, which proceeded to establish village committees within its area.

The Sekute CDT was organized into a hierarchy. At the top of the hierarchy is the Community Development Trust Board, which consists of Trustee representatives from 15 Area Trust Committees. Below the Community Development Trust Board sits the Area Trust Committees, which consist of representatives of villages from

15 area structures. Below the Area Trust Committees are the Village Trust Committees, which consist of 289 village structures (10 households per village). Each of the 2,900 households in Sekute elects a household representative to sit on one of the Village Trust Committees. Overall, the hierarchy is designed to democratize the traditional system of land administration in the Sekute Chiefdom.

In 2003, a Board of Trustees was elected, and eventually the Sekute Trust was registered with the Registrar of Societies in the Ministry of Home Affairs. The Sekute CDT drafted by-laws to help manage natural resources in the area. The Kazungula District Council adopted the by-laws. The by-laws help regulate charcoal trading as well as streamline investments from the private sector.

In 2006, a survey of Sekute’s Zambezi River frontage revealed that land conversions to which the Sekute Chief gave consent, without negotiating for ecological plans or community benefits, were threatening vital community access (Metcalf 2008). Community members appealed to the Sekute CDT. To protect remaining communal land, the CDT decided that it would identify potential investment sites and pressure the Chief to allocate such sites to the CDT. The CDT also appealed to the District Council to cease processing lease applications. Ultimately, the Sekute Chief agreed to allocate several islands, wildlife habitat, and river frontage to the CDT. In 2007, the AWF hosted a workshop with the Sekute CDT, which resulted in a written agreement on a process for issuing communal land. Pursuant to the agreement, traditional leaders and the CDT will work together when negotiating future lease agreements with private investors (Metcalf 2008).

WAYS FORWARD: PROPOSALS TO REFORM THE LAND TENURE SYSTEM

In 2006, the Zambian government published a Draft Land Administration and Management Policy to address the problems with the land administration system. The Draft Policy proposes that the Government will “introduce group land rights to allow for the registration of village, family and clan land... recognize the rights of customary land users by defining their rights through a formal survey and registration... ensure that no chief shall recommend land for alienation without consulting his/her subjects... make the system more accessible and affordable to a wide range of eligible applicants... [and] decentralize the functions of the Commissioner of Lands...” (secs. 4.3.3, 4.5, GRZ 2006).

In 2006, a group of civil societies and customary leaders issued a response to the 2006 Draft Policy (ZLA, 2008). It stated that the land policy should “ensure that, before consent for customary land to convert to leasehold is granted, there is consultation and consensus by all those affected by the said conversion. The ultimate authority to allow land to be given over for conversion will rest with the community” (ZLA, 2008). The civil societies also called for the establishment of “a reverse clause for customary land that is converted to leasehold to revert to customary land status...” (ZLA, 2008). Although the Zambian government has not yet reformed the 1995 Land Act, there seems to be some consensus among civil societies that strengthening the role of traditional communities in the decision-making process and providing for the reversion of customary land could help secure customary land rights in Zambia.



Because the Land Act does not specify what happens to converted land at the end of the lease, in practice the land has reverted to the state instead of the community. Photo: ©CIAT

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